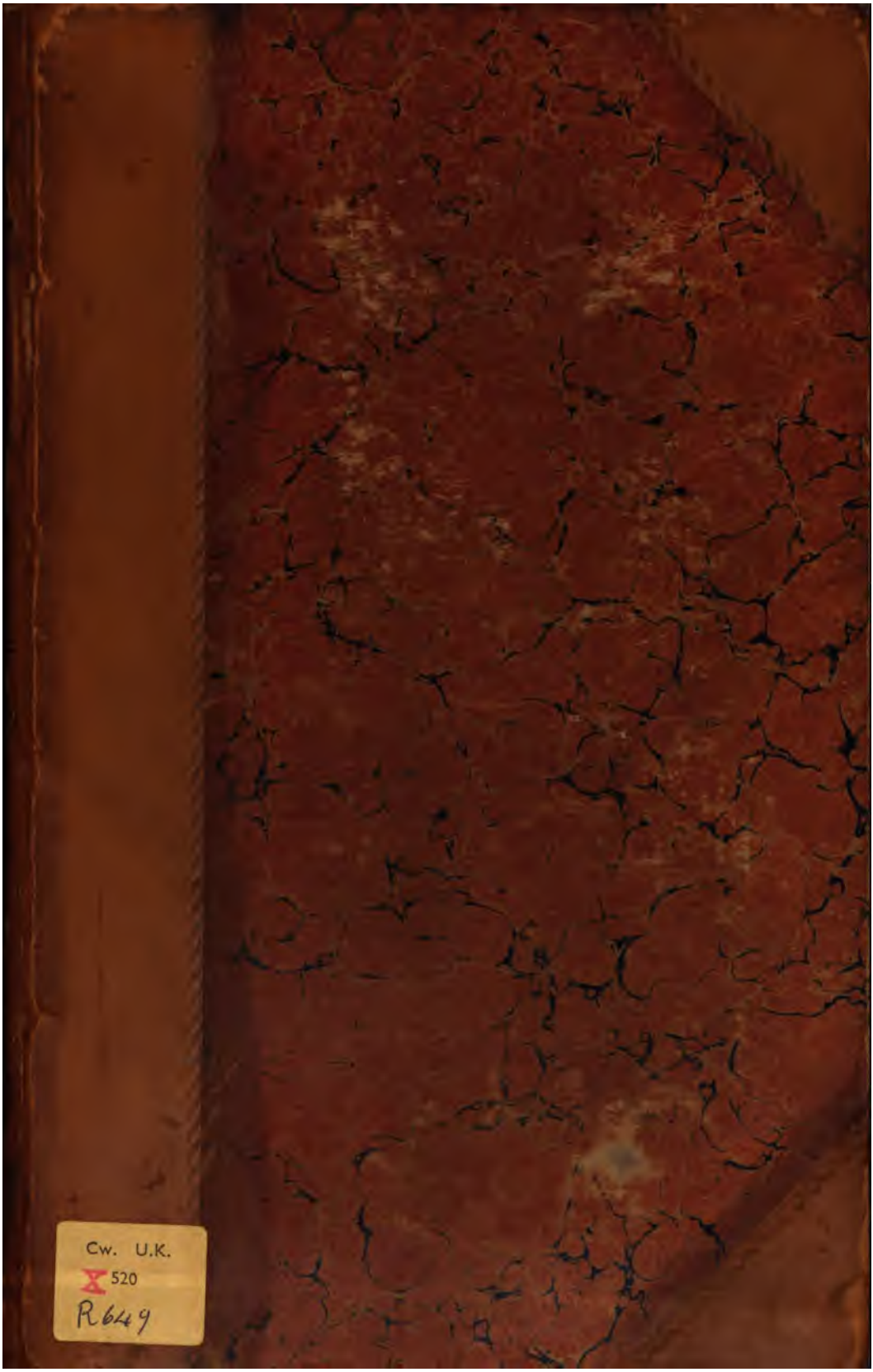


THE

LAW OF LEGITIMATION

BY

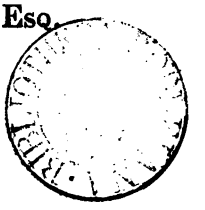
SUBSEQUENT MARRIAGE:

ILLUSTRATIVE OF THE VARIANCES BETWEEN

THE LAWS OF SUCCESSION TO PROPERTY IN ENGLAND AND SCOTLAND.

"Major hæreditas venit unicuique nostrum à jure et legibus quàm à parentibus."
CIC.

By ERASMUS ROBERTSON, Esq.
OF THE INNER TEMPLE.



LONDON:
SAUNDERS AND BENNING, LAW BOOKSELLERS,
(SUCCESSORS TO J. BUTTERWORTH AND SON,)
43, FLEET STREET;
AND BLACKWOOD, EDINBURGH.

1829.

LONDON:
Printed by WILLIAM CLOWES,
Stamford Street.

PREFACE.

THE very interesting and important subject of the following pages was originally intended to form a title of a work on Legitimacy, now preparing for the press. The completion, however, of this work having been delayed, the Author has been induced, on the representation of some whose opinions he highly values, to submit these sheets to the candid consideration of the public in general, and of the legal profession in particular. And, certainly, no period could be more adapted to this purpose than that in which two cases on the subject, having excited very considerable interest both in this country and in Scotland, are now standing for hearing in the House of Lords:—*Birtwhistle* v. *Vardill*, on a writ of error from the Court of King's Bench, and *Munro* v. *Ross*, on appeal from the decision of the High Court of Session of Scotland.

The Author has only to add, that, although the work may appear small, he can confidently state, that no point

connected with its title has escaped his observation. This is the first attempt to collect and digest the decisions and doctrines, according to which questions of Legitimations must be decided. And he may be permitted to state, that he has developed some applications of received principles, which, while they are novel, he hopes may be considered correct.

THE

LAW OF LEGITIMATION

BY

SUBSEQUENT MARRIAGE,

&c.

Both by the civil and canon law, children born before marriage are rendered legitimate by the subsequent intermarriage of their parents, subject to certain qualifications. This was established in the civil law by the Emperor *Constantine*, as a temporary law applicable to past concubinage, and to children born before the date of that law. It was afterwards confirmed by Justinian, at whose hands it obtained its present enlarged application. It was adopted in the canon law by a constitution of Pope Alexander III., A.D. 1160.

Justinian appears to have been in some degree actuated to the support of this institution, by a consideration, I believe, not hitherto remarked. This is to be traced as resulting from his impression, that the birth of the children before marriage produced the affection which caused the subsequent intermarriage of the parents, and so gave occasion to the legitimacy of the children born thereafter*.

* "*Nec non eos, quos nostræ amplexæ sunt constitutiones, per quas jussimus si quis mulierem in suo contubernio copulaverit, non ab initio affection,*

And there is certainly a colour of reason and of justice in ordaining, that they who were the instruments—although, indeed, the passive ones—of producing an acknowledged benefit to society, as well as to individuals, should not themselves remain wholly destitute. Though, at the same time, it must be admitted, that the *policy* of legitimation by subsequent marriage should be decided by its inducement or non-inducement to the committal of the offence of concubinage. But its displaying a facile and certain means of purgation, and that wholly without penance, may probably tend greatly to the former alternative.

The institution of legitimation by subsequent marriage prevails, with different modifications, in most countries in Europe. It does not exist in England; it does in Scotland. The chief intent of the following pages is to supply these facts to the institution of real or heritable succession in England and in Scotland; and to shew, generally, the reasons and principles thence resulting on which a man is capable in one country, and, at the same time, incapable in another, to succeed to property.

To this end, I shall first endeavour to point out the inapplicability of those principles, which have at times been urged as the test for ascertaining the effect of a subsequent marriage on issue previously born; I shall then assert, and I trust be able satisfactorily to maintain, the only principle on which cases of this nature can be

maritali, eam tamen, cum qua poterat habere conjugium, et ex eo liberos sustulerit, postea vero, affectione procedenti etiam nuptialia instrumenta cum ea fecerit, et filios vel filias habuerit, non solum eos liberos qui post dotem editi sunt, justos et in potestate patris esse; sed etiam anteriores qui et iis, qui postea nati sunt, occasionem legitimi nominis præstiterunt." — Inst. Lib. iii., t. 1, § 2.

legality and constitutionally decided. I shall not, however, decline the statement and discussion of any point which I may find bearing on the general question.

I. *Lex loci contractus* of the subsequent marriage is not the test for discovering the legitimacy or illegitimacy of children previously born, when legitimacy is the ground of claim to a civil right in another country.

For, first, it by no means appears, that legitimation does follow as a necessary incident even there, to every subsequent marriage contracted in a country in which legitimation, as a general principle, is allowed to prevail; on the contrary, it can be shewn, that a marriage contracted between aliens, although domiciled in such a country, does not convey this privilege of legitimation even in the very place of the contract. Thus, it is stated on the authority of *Bullenois**, an eminent French lawyer, 'that English persons, having a child in England born in concubinage, and coming to remain in France, and being there married, not having been naturalized, do not by such marriage legitimate the child, *quoad* legal or civil claims in *France*.' Though, at the same time, the *marriage* itself, if contracted according to the ceremonial of the law of France regulating marriages, would, undoubtedly, be valid in that country.

Secondly, children born before marriage are held legitimate in one country, from the fact of a subsequent intermarriage of their parents in another country, in which it is the express and positive law, that the marriage has *not* the effect of legitimating bastards. On the authority of Mr. Butler† it is stated, that, "By an

* Vol. I. p. 62. † N. 1. Co. Lit. 245. a.

arrêt d'audience of the 21st of June, 1668, it was adjudged, that if a person marry in England a woman, by whom he had children previously to the marriage, the children born in France are legitimated by it, and acquire all the rights of legitimacy under the French law." This principle ruled in the case of *Conti*, in which the marriage having been celebrated in England, the children, previously born, were nevertheless held legitimate to civil purposes in France. What becomes of *lex loci contractus* in these cases? Its application is directly negatived.

Further, thirdly, to say that the legal consequences of marriage in general must depend on the law of the place in which it is entered into, is established as incorrect by the divorce cases of 1816. The argument in these cases was, that an English marriage must be indissoluble in Scotland, not only because the personal status continued when the person passed into another country, but, *a fortiori*, because the status of marriage was constituted by express contract under the law of England, which specially fixed it indissoluble; and that this status could not therefore be changed without violation of that contract. Yet the Court of Session unanimously held this argument bad, and the divorces themselves good.

On the other hand, I am well aware that the English law holds the Scottish divorce of the English marriage void, when a question touching a right in England is involved (the only case, I submit, to which the laws of England are applicable); this makes the point still stronger. For the Scottish law, on the one hand, divorces the parties, *although* the English law declares the marriage indissoluble, and such parties are absolutely divorced *quoad* the jurisdiction of the Scottish law, and no

further." The English law, on the contrary, declares a divorce which is good by the laws of Scotland, bad within the jurisdiction of the laws of England; but it does not pretend to declare it bad to any greater extent than this, which it could not do without manifest absurdity—allowing, at the same time, other countries to have laws of their own. The contrariety of the above decisions is grounded on this broad position,—the laws of one country not governing another. When a claim is raised under the law of Scotland, the law of that country determines it; when it is raised under our law, *that* determines it. And although the House of Lords here happens to be the Supreme Court of Appeal from the decision of the courts of Scotland, yet the House of Lords, sitting to determine a question on such appeal, are as strictly bound to decide agreeably to the law of Scotland, as they are, in an English appeal, to decide conformably to the law of this country. If, therefore, after a divorce in Scotland, of an English marriage, a child is born of a subsequent marriage of one of the parties, (living the other) with a stranger, and the question be raised in the House of Lords, on appeal from a decision in Scotland, whether such child is legitimate to inherit lands in Scotland, the court of appeal must determine according to the law of Scotland, which holds the divorce good, and not according to the law of England, which declares the prior marriage indissoluble. For in this case there could be no question of English law (as we shall see hereafter); the only point being the *right to inherit lands in Scotland*. But if this question had been mixed with reference to inheriting lands in England, the deci-

sion, on the very same principle, must have been precisely the reverse.

These points severally negative the idea of *lex loci contractus* being the principle for deciding legal claims in cases of this description; and at the same time, they all strongly support this position, that the law of the country in which a question of right or privilege is claimed must rule the decision.

I may here observe, to prevent all ambiguity, that under this, and the following head, I do not include that claim or right, which is confessedly to be determined by the law of the *domicile*, viz. the succession to personal *or moveable* property of an intestate; this is a case beside the present part of the question, and, as such, will be treated hereafter on its particular merits.

II. Legitimacy impressed in one country, is not a personal status necessarily following a man all over the world, or even into any other country, and enabling him to maintain there a civil claim *on the ground of legitimacy*.

By the imperial law, children were rendered legitimate either by adoption, by rescript from the emperor, or by the subsequent intermarriage of their parents. All these means may have equal efficacy in legitimating in their proper countries; but it cannot be maintained, and never yet was even urged, that persons standing in either the first or second predicament can claim succession in this country, or even in Scotland, *on the ground* of legitimacy. Bastards in Scotland are indeed said to be capable of "*legitimation*," by letters of legitimation from their sovereign. But these letters, though they contain high-

sounding clauses, have no tendency to hurt the right of third parties; *they merely enable the bastard to dispose of his moveable estate by testament.* "The bastard is not therefore entitled, in consequence of this sort of legitimation, to a bairn's part of gear, nor to any share of his father's succession."*

The Pope may grant a dispensation to make an incestuous marriage legal, and the issue consequently legitimate; but will the law of Scotland or England bend to the authority of the court of Rome, if the progeny come here with this status of legitimacy, and claim the rights of legitimate children in either of these countries? Could a child, born of such an intercourse, be heir to land in either of these countries? There is no more magic in the legitimacy, whether it be obtained by adoption, by rescript, by dispensation, by subsequent intermarriage, or by any other means which the law of any country may ordain for producing this effect. Then if children are not legitimate, from one acknowledged form of legitimation, existing by the laws of a foreign land, because it is contrary to the laws of another country, how can they be rendered legitimate in the latter country, by any other means equally contrary to those laws? I conclude that legitimacy, implanted by the laws of one country, does not necessarily enable a man to maintain claims, grounded on the fact of legitimacy, in any other country; in other words, the personal status said to be implanted in one country, will not govern the local law of another country.

A man, considered here a bastard, may indeed enter this island, and sitting down quietly, enjoy his *status* of legiti-

* Ersk. Inst. l. iii. t. 10. § 7.

macy implanted by other laws, and he will not be interfered with; but the moment he breaks forth, claiming here rights and privileges by the laws of this realm, exclusively appertaining to legitimate blood, he will find that, although he has imported his person, he has not imported the law of a foreign land, for the regulation of British rights. The very idea of a man carrying about with him, all over the world, a portion of the laws of a particular country, for the regulation of any claim he may think fit to make during his journey through life, seems quite monstrous; the absurdity of the *principle* would not be extended, were it held, that a man might carry the "*statutes at large*" about with him for the same purpose.

Nor do the cases of Sheddan *v.* Patrick *, and of the Strathmore peerage †, militate against the positions here maintained; on the contrary, if viewed in their proper light, it will be seen that they do not support the principle of the *lex loci contractus*, or either of the other doctrines on which a personal status is grounded, as guiding the decision of a claim grounded on an alleged legitimacy. In the former of these cases, a man married in America, where the law of legitimation, by subsequent marriage, certainly did not prevail; in the latter, a marriage was contracted in England, where this law of legitimation confessedly does not exist: in *this* case it was decided, that issue born before the marriage of the parents, were not legitimate for the purpose of succeeding to the title and estates annexed to a Scottish peerage; in *that* case it was held that issue, similarly placed,

* 1 July 1803, Fac. Coll. Affirmed H. Lords, 2 March, 1808.
† H. Lords, March 1821.

could not succeed to heritable property in Scotland. Now, the law of Scotland is this: *marriages contracted in Scotland* have certain peculiar incidents annexed to them, by the municipal law of Scotland—one of which is legitimation of children, previously born of the bodies of the parties, subject to certain restrictions. This has no reference to the law of any other country; *it is merely the result in Scotland of a Scottish marriage.*

The decision in the above cases, does not turn on the marriage being contracted *in England*, or *in America*, but on the fact of its *not* having been contracted *in Scotland*; and, on this account, the claimants were declared not entitled to the benefits in Scotland, which result from a contract formed in Scotland. These decisions do not in any degree touch the point of the effect, as to Scottish rights, of a marriage had in another country, in which legitimation by subsequent marriage *is allowed*; and even if it were decided, that such a marriage would have the same effect in Scotland, as if the marriage had been had *in Scotland*, yet it would be no contradiction of these decisions on the converse of this proposition. It would merely be recognising laws, in this instance, the same as their own; it would merely be acknowledging the propriety of the principles of their own law existing in a foreign land, without respecting the *locus contractus*, as the *principle* of decision; instead of permitting foreign laws to control theirs, they would, in this case, be manifestly acting on their own. But in Sheddan *v.* Patrick, and the Strathmore case, they could not recognise the principles of their own law, in those of a foreign country, when those principles did *not* exist; and the laws of Scotland will not give a *greater* effect to a mar-

riage in a foreign country, than the laws of that country gave to it.

At the same time it must be observed, that the author by no means presumes to assert that the laws of Scotland will, in the case of Scottish claims, acknowledge, as legitimate, issue of parents subsequently intermarried in a *foreign* country, even although the law of the country in which the marriage was made gave it that effect *there*. This point, he believes, has never yet called for legal decision. When it does arrive, it must depend upon the principles of the law of Scotland, inducing or withholding the extension of the effect of a Scottish marriage, to one contracted within another jurisdiction, the law of which, in this instance, is similar to their own. All that is contended for is, that deciding *for the legitimacy in such a case, would not be a violation of the decisions in Sheddan and Strathmore.* These cases have settled *this:* if a man marry *in America*, the succession to his heritable property *in Scotland* is regulated by the law of Scotland; if he marry *in England*, his Scottish rights are determined by the Scottish law. In one word, the cases of Sheddan and Strathmore, instead of bowing to the *lex loci contractus*, or to personal status, *firmly establish the supremacy of the Scottish law as the decider of Scottish claims.*

In Sheddon and Strathmore the principles of the Scottish law of marriage were decided not to be capable of extension to a foreign marriage founded on principles opposed to the law of Scotland. And however the law of Scotland may recognise foreign law *so far* as it runs parallel to their own, we may rest assured that they will assert and act upon their own whenever a claim to Scot-

tish rights is maintained on a principle of law contravening theirs. For proof of this fact, we have only to look at the law of Scotland with respect to *mid-impediments.* By that law, children born in incest and adultery cannot be legitimated. "Then as to an intervening marriage, it is is said that there is a fiction of law which supposes a marriage prior to the birth. The Novell of Justinian, however, says, that an intervening marriage shall not bar legitimation. It was the canon law which introduced the fiction, to prevent the children of the intervening marriage being deprived of their just rights. In Holland, the canon law on this point is not received. But in France, the intervening law does not bar legitimation; *although the children legitimated* are held, *quoad* their rights, as younger than those of the intervening marriage. In Scotland there is no authority as to how the matter stands; and the question is still open, although certainly we would not allow the rights of the children of the intervening marriage to be defeated."* This is from the reported arguments of two very eminent Scottish advocates, who were arguing *in support* of a right resulting from an allowed legal marriage in Scotland. This statement met with no contradiction; neither could it, for it was a true statement of acknowledged law. Then, suppose a child born in Holland, before whose legitimation the parents have become married to third persons, and have children, and then are subsequently intermarried, would such child defeat the Scottish claims of a child by an intermarriage, on the principle of the law of Holland, when opposed to the admitted law of Scotland?

* Munro *v.* Ross. 5. Shaw and Dunlop's Reports of Cases in the Court of Session, 611.

If the law of Scotland be altered to meet this case, it must be *re-altered* to meet the opposite case when occurring in France, where a different law prevails; it must be again altered to meet all cases occurring in all the different nations of the world, in which this principle of the canon law does not exist; and must be again re-altered to suit the principles of the laws of all other countries, which may be brought forward in Scotland, as opposing this doctrine of the canon law. And this is not all—a claim to a civil right may be instituted in Scotland, grounded on personal legitimacy either from the *lex loci contractus* or the place of birth, in another country, which has its foundation in an incestuous or an adulterous intercourse;—can it be maintained that the positive law of Scotland or England, which excludes all such persons from the rights of legitimate children, will be abrogated to meet *this* personal status of legitimacy? If the doctrine of personal status or *lex loci contractus* were to prevail, the law of Scotland must be changed and turned about, and positively annulled, to suit the contrary legal ideas of every other country in the world; until at last it would have no law of its own left at all. Would the most obliging nation on the face of God's earth, for the purpose of permitting such absurdities as these, thus sacrifice at the shrine of that juridical phantom—*jus gentium*, that which principle, deliberation, and experience have established and confirmed as their municipal law? There could be no *comitas gentium* of such a nature as this, without a direct violation of the very first principle of international law! and this brings me to observe, that, although the doctrine of personal status is generally supported on the specious pretext of

international law, its adoption is opposed, as I said before, to its grand and fundamental principle: viz., that *local* rights and privileges are to be adjusted and determined by the *municipal* law of that place, in which *the* right or privilege is claimed. On this head it would be an unnecessary waste of time to urge authorities; the laws of every independent nation admit it. And I have no hesitation in affirming, that, in any independent nation, a personal status—having for its foundation *lex loci contractus*, the place of birth, *or any other principle—as opposed* to municipal law, never truly governed the decision of a single case since the creation of this world.

Having endeavoured to shew that the *lex loci contractus* is not the governing principle for ascertaining legitimacy; that a status of legitimacy implanted by the laws of one country does not necessarily make a man legitimate in another country, I shall proceed to make a few observations on *lex domicilii*.

III. *Lex domicilii* does not govern questions of *real* or *heritable* succession. The succession to personal or moveable property of intestates is regulated by the law of the domicile—this is admitted on all hands*.

Its fluctuating nature producing the tendency to the general circulation of this species of property, it became necessary, as a matter of policy, in order to avoid the conflicting of the laws of the different countries through which it was liable to be dispersed, that one uniform rule should be adopted for its general government. For, if this were not the case, every country, in which a portion of an intestate's property happened to be deposited,

* Somerville v. Lord Somerville, 5 Ves. 750.

would naturally apply its own laws towards its distribution: this was not convenient. Then, for the purpose of ascertaining the *general* position of moveable estate, and hence that law which, with the least violation to the *lex loci rei sitæ*, should operate upon the aggregate of this species of property, it came to be established that the law of the *domicile* should prevail. And this is no violent conclusion, when we reflect, that moveable estate, as its very name and properties import, did wholly primitively, and even now in bulk does, actually follow a man to that spot which he has selected to reside in *as his domicile*; and to constitute *this*, he must be there "*animo remanendi*," "*ubi larem, penates, rerum ac fortunarum suarum sedem constituit.*" This is the domicile; and this is it, as is shewn by the definition, because it is the seat of the greatest and most material part of his moveable or personal estate.

Now, I submit that the law of the domicile regulates the succession to personal estate, merely because it is the place of domicile in which the bulk of the property, the *subject matter*, and the *whole*, in presumption and contemplation of law (grounded on the reasons before given) does actually exist; and that the law of the domicile was originally fixed upon merely as a *test* or means of discovering the position of the things to be administered. And, when this is discovered, by ascertaining the domicile or the spot, "*ubi quis larem rerumque ac fortunarum suarum summam constituit*," we still see that *lex loci rei sitæ* does really and truly operate; *lex domicilii* is the medium (and, in this case, the only medium which could with propriety be employed) for bringing into action the only power I can conceive operating on a civil right—*lex*

loci rei sitæ. *Lex domicilii* does not regulate the succession to *land*, because *its* position can never vary with or at the pleasure of the person, and consequently because there is no occasion for the application of this medium to discover in what jurisdiction the land does lie.

I think I am in some measure supported in the construction I have put on the *lex domicilii*, by what fell from the Master of the Rolls in the conclusion of his judgment in the Somerville case. "What," says he, "would be the case upon two contemporary and equal domicils, if ever there can be such a case? I think such a case can hardly happen; but it is possible to suppose it. A man born no one knows where, or having had a domicil that he has completely abandoned, might acquire in the same or different countries two domicils at the same instant, and occupy both under exactly the same circumstances—both country houses, for instance, bought at the same time. It can hardly be said that of which he took possession first is to prevail: then, suppose he should die at one, shall the death have any effect? I think not, even in that case; and then *ex necessitate* the *lex loci rei sitæ* must prevail; for the country in which the property is would not let it go out of that, until they know by what rule it is to be distributed. If it was in this country, they would not give it until it was proved that he had a domicil somewhere."*

Looking at *lex loci rei sitæ* as the fundamental principle on which the *lex domicilii* acts, we avoid doubts which otherwise might arise on questions touching the

* 5. Ves. 791.

distribution of personal estate. I can only attribute it to the non-observance of the principle, on which it is conceived the *lex domicilii* proceeds, that the cases of Balfour *v.* Scott* and Drummond *v.* Drummond† have sometimes been considered as not very comprehensible. "In the former, a person *domiciled* in *England*, died intestate, leaving heritable property in *Scotland*. The heir was one of the next of kin, and claimed a share of the personal estate. To this claim it was objected that, by the law of *Scotland*, the heir cannot share in the personal property with the other next of kin, except on condition of collecting the real estate; that is, bringing it into a mass with the personal estate, to form one common subject of division. It was determined, however, that he was entitled to take his share without complying with that obligation." The question here in dispute was the distribution of the *personal* property; that property, in contemplation of law, was situated in *England*, for *there* was the acknowledged *domicile;* then how could a doubt exist as to the law by which this property was to be distributed? What could the law of Scotland have to do with it? *Here* was the domicile, consequently the law of England, *lex domicilii*, (or, as I shall presume to put it, *lex loci rei sitæ*, through the medium of the domicile) ruled the decision.

"In Drummond *v.* Drummond, a person, *domiciled* in *England*, had heritable property in *Scotland*, upon which he granted a *heritable bond*, (which, I may observe, is very much in the nature of an English mortgage, being a

* 6 Bro. P. C. 550. } Referred to in Brodie *v.* Barry, 2 Ves. and Beames
† 6 Bro. P. C. 601. } 131.

conveyance of land to be held by the creditor in security of his debt.) The debt was contracted in England. He died intestate; and the question was, by which of the estates this debt was to be borne. It was clear that, by the *English* law, the personal estate was the primary fund for the payment of debts. It was equally clear that, by the law of Scotland, the real estate was the primary fund for the payment of this bond." It was argued, that here was a direct *conflictus legum*, and a great deal was talked about the *domicile;* but fortunately for the independence of the laws of both countries, it was determined that the real estate must bear the burden. Now what was the real question in this case? Neither more nor less than this,—whether land, situated in Scotland, was to descend according to the law of Scotland, *or* be regulated by the law of England? The law of Scotland, saying that the land in that country is subject to all the burdens, which by the same law are imposed upon it, the parties interested run wild on the subject of the law of the *domicile*—a rule adopted to ascertain the position of the personal estate. The domicile was certainly in England; the moveable estate was therefore here; the law of England, consequently, operated on the property within its jurisdiction: but what could this have to do with the law of Scotland, regulating the descent of land in that country? If the decision of this case had been otherwise than it was, it would have been decided that the law of England, and not the law of Scotland, regulated the descent of land in Scotland!

This case of Drummond *v.* Drummond is a direct authority for the position, that the law of the domicile does *not* govern cases of real or heritable succession.

It has been stated in argument for *lex domicilii* ruling the succession to land, as well as to personal estate, that otherwise a man may be legitimate to one purpose, *viz.*, to *personal* succession, and, at the same time, illegitimate to another, *viz.*, to succeed to land. This argument may sound specious enough, but, if we look to any thing further than words, it has no force. The fact is, he is *not* incapable by the same law. If a man is legitimate to one, and illegitimate to the other purpose of succession, it is because the opposed laws of two different countries are operating on the two different species of succession; and because the law of one country does *not* control *or* govern that of another,—the cause of all which is, the ancestor having thought fit to fix his domicile—in its legal signification—*out* of that country in which his land was situated. If he had remained upon his land, instead of running into a foreign country, and thereby subjecting his moveables to a foreign jurisdiction, his issue could not have complained of being legitimate or illegitimate to one purpose only; they would then have been legitimate or illegitimate, to succeed to both land *and* goods *. If the ancestor instead of taking his money out of the country in which his land was, which country on the first principles of tenure every landholder is bound to support—if instead of impoverishing *it*, by drawing the means of prosperity out of it, he had fixed *his domicile there*, then there could have been no mistake in this matter: it could not have been then maintained, as, in point of

* This observation is certainly not directed to persons merely crossing "the boarders," nor even to persons crossing the seas; but to those fixing their habitation, "*animo remanendi*," in a foreign land—creating, in technical language, "a domicile of choice."

fact, it never was the case that a man is legitimate to one purpose of succession, and, at the same time, illegitimate to another by the laws of this, nor, I imagine, of any other country.

It is allowed, that the law of the domicile rules the succession to personal estate. Now, under the statutes of this country, for the distribution of the personal estate of intestates, none but legitimate persons can come in. If the domicile be here, and a person considered a bastard by our law—though legitimate in the country of his birth—is admitted under the statutes of distribution, the law of the domicile does *not* prevail. To admit this case, would be overturning a principle recognised in all contests of succession to personal estate—*lex domicilii*. Put the case of a man dying domiciled here, and intestate, leaving children born of divers co-existing wives in Turkey, who are all legitimate enough by the law of *that* country; admit the contract there, and that the place of birth,—would the personal status overturn the admitted principle of decision, the law of the domicile, which expressly characterizes these persons as bastards, and, therefore, refuses to admit them to the exclusive right of legitimate children? If this were answered in the affirmative—there is an end of the *lex domicilii* altogether; which law has never yet been questioned *quoad* the succession to personalty.

If, on the other hand, it be admitted that the personal status is to be restrained, when opposed to the law of the domicile; in other words, that the law of the domicile is to continue to govern all cases of personal succession, it appears, indeed, strange that, with respect to *land*, the first and most important property of all, the position of

which is so evident, that it requires *no medium* for ascertaining the jurisdiction in which *it* lies, that it can be contended that a personal status does prevail in opposition to the municipal law of the country in which this property exists?

But it is unnecessary to proceed further in the support of negatives. There is an affirmative and transcendent principle governing every right and title to land.

Before leaving the foregoing part of the subject, however, I may observe, that a single line of argument in favour of legitimacy *per subsequens matrimonium* in general, grounded in the place of contract, the place of birth, *and* the domicile, or on any two of them jointly, is false. For, put the case of the *contract* in one country, the *birth* in another, and the *domicile* in a third, in each of which a different law prevails as to the general question. It is clear that *one* of these principles must be relied on to the *exclusion* of the other two. In the argument in the Court of King's Bench *, for the lessor of the plaintiff in Doe *d.* Birtwhistle *v.* Vardill, the whole of these three points appear to have been blended together; although it is certainly proper to add that, with respect to that particular case, the contract, birth, and domicile, were confessedly in one country. But this by the way:—I have endeavoured to speak to each on its own ground.

IV. The supreme, and indeed the only power giving and regulating a right to *land* resides in that country in which this property is placed. THIS is a *jus gentium*

* 5. Barn. & Cress. 440.

applying to all independent nations. The State has the chief interest in the land; and to this circumstance the peculiarity of constitution and government of different countries is mainly to be attributed: to this circumstance is to be traced, not only the origin of particular institutions, but it is itself the grand source whence has sprung those great political convulsions and revolutions which at times have agitated and convulsed the civilized world. The asserting this first principle of international law has occasioned the clash of arms and the din of international war; and this principle has been maintained at the cost of much treasure, and at the great sacrifice of human blood—it is established on the defeat of opposing nations. —"*Quilibet advena in percipienda hæreditate, succedit non secundum suæ personæ, sed secundum jura terræ Saxoniæ, etiam cujuscunque terræ sit, sive Bavariæ, Franciæ, vel Suevicæ nationis**."

To the same effect speaks also Erskine, in his Institute of the Law of Scotland†. In the midst of laying down the rules governing the succession to heritable property, he says, "Before going further, we may mention, as an universal rule in every country, that the succession to land estates, and all heritable subjects, must be governed by the law of the kingdom or state where they are situated, and not according to the *lex domicilii* of the proprietor, though he should happen to die abroad, and have his settled residence there at his death."

Lord Coke, observing on the opinions of the Judges in Calvin's case‡, says, "Also in their arguments of this cause concerning an alien, they told no strange histories, cited no

* *Hertius de Collisione legum*, sec. iv., § 9.
† L. iii. t. 8. s. 10. ‡ 7 Rpt. 7.

foreign laws, produced no alien precedents, and that for two causes: the one, for that the laws of England are so copious in this point, as, God willing, by the report of this case shall appear; the other, lest their argument concerning an alien born should become foreign, strange and an alien to the state of the question, which being *quæstio juris* concerning freehold and inheritance in England, is only to be decided by the laws of this realm."

In the Second Institutes* Lord Coke speaks to the same effect: "Our common laws," says he, "are aptly and properly called the laws of *England*, because they are appropriated to the kingdom of *England*, as most apt and fit for the government thereof, and have no dependency upon any foreign law whatsoever, no not upon the civil or canon law, other than in cases allowed by the laws of *England*, as partly hath been touched before: and therefore the Poet spake truly hereof—*Et penitus toto divisos orbe Brittannos*: so as the law of England is *proprium quarto modo* to the kingdom of England; therefore foreign precedents are not to be objected against us, because *we are not subject to foreign laws*."

"The hereditary right," says Blackstone†, "which the laws of England acknowledge, owes its origin to the founders of our constitution, and to them only. It has no relation to, nor depends upon, the civil laws of the Jews, the Greeks, the Romans, or any other nation upon earth: the municipal laws of one society having no connexion with, or influence upon, the fundamental polity of another."

* 98. † 1 *Com.* 192; speaking of the descent of the crown.

This rule prevails with respect to lands allodial. As to feudal tenure, and lands holden on principles grounded in the feudal law, the *lex loci rei sitæ* is a necessary and unavoidable consequence flowing from the nature of the holding.

Feuds, the military policy of the northern nations, were devised for securing their new acquisitions of land. These lands were allotted by the conquering general to the superior officers of the army, and by them were again distributed to the soldiers in smaller shares. As the principle of the feudal system was founded in conquest, as all its relations tended to preserve and defend that conquest, so all *fiefs* were originally held by a condition of military service; and as a part could not be preserved independently of the whole, all givers as well as receivers were mutually and equally concerned and bound to defend the whole. But this could not be done in a tumultuous manner; hence, a regular military subordination was introduced. Every feudiary was obliged by his feudal tenure to attend and support the defence and security of the whole country or of a particular district, whenever he should be required by his immediate superior; and such superior was, in like manner, subordinate and subject to his benefactor or superior; and so upwards to the general himself. Thus an army of feudiaries were at all times ready to muster and engage in the general defence of the country*. Hence, Spelman calls a feud *Prædium militare;* and says, "*Feudorum inventum peperit rei militaris necessitas*†;" and *Somner* observes, that every inheritance is incorrectly called a *fief* or *fee* that is not

* See Wright's Tenures. † Gloss. *in voce* '*Feodum.*'

holden '*militiæ gratia*'—the ground of all fees. The first principle then of the feudal nations was the maintaining the possession of their lands against every opposing power, whether of foreign arms or foreign laws.

It was this grand principle of the feudal law, looking more to the support and strength of the community, and the retention of their acquisitions, than to individual aggrandisement, which introduced the distinction between the *dominium directum* and the *dominium utile*. The ultimate property in, and the governing power over, all the lands in the kingdom, residing in the society or community at large, the use thereof was parcelled out to those, who, in return, were of common right to perform the necessary services for the support of the whole, or, on failure thereof, instantly forfeited their individual advantages. And this being the case, the community alone had power to prescribe such conditions and restrictions for the holding of all the lands in the kingdom, as to them seemed advisable.

Now, the general or chief for the time being representing the community, although at first elected as occasion required, yet, becoming firmly fixed in his office as the danger became permanent, against which he had been elected to contend,—the *propriety* or *dominium* of the soil became vested in him in his political capacity. Hence, in respect of the *Dominium*, he was called *Dominus*; and being at the head of society he was called the *chief Lord*, in contradistinction to the mean or intermediate Lords. Hence, "*Dominus in jure definitur, qui proprietatem rei habet* *."

Into whatever country the feudal system or the prin-

* *Craig, de jure feud.* 43.

ciples of the feudal law have been introduced, this fundamental maxim was its inseparable accompaniment—that 'the chief lord, *i. e.* in most cases the king, as representing society, is the universal lord and original proprietor of all the lands in the kingdom; and that no man doth or can possess any part of it, but what has been mediately or immediately derived from him.' In such countries it is, therefore, evident that every property in land was governed by the laws of its own society or country, and could not be influenced by those of any other. Feuds were originally precarious, and held at the will of the lord; then they became certain for one year, and were some time after given for life *. But, as Dalrymple † observes, it readily occurring to superiors, that a man would venture himself less in battle when the loss of his life was to be attended with the ruin of his family, it became at last usual to admit the descendants of the feudatory, *provided* he was able to perform the services of the feud, and the lord had no just objection against him. Thus, says *Craig* ‡, *Licet Hæreditaria successio tum non erat in feudis, nativi tamen hi tenentes dicebantur ut apud nos hodie, quos nisi justa offensiæ causa præcesserit, et ad serviendum non sufficerent, durum erat a suis possessionibus removere.* And this succession even then was by no means an absolute right, as is acknowledged, as well by what has already been shown, as by the feudal histories of all nations, a *fine* or *relief* being constantly paid to the lord, in order to secure the possession. And even when, by force of the terms of the donation, the feud had obtained an hereditary capacity, when it after-

* Wright, quoting Lib. Feud. and Hanneton de jure feud.
† Feud. Property. Hist. of Succession. ‡ 20—1.

wards became necessary for the performances of the feudal services, that only one son should succeed to the feud, it was for a long period in the option of the lord to single out that *one* from among the sons of his late vassal, in whose persons he might think fit to renew the tenancy. "Sic progressum est ut ad filios deveniret, in quem dominus vellet hoc beneficium confirmare*." "A beautiful instance of the remains of this ancient practice," as Dalrymple observes, "is still to be seen in the law of England, at this day, when a peerage devolves to heirs female. In that emergency, it is the king's privilege to confer the peerage upon either of the daughters he pleases."

From the very nature then of feuds, we see that none could succeed to the inheritance, but such as were approved of by the lord of the fee; and particularly we are to remember, that the feud itself could not have had an hereditary capacity at all, without his permission; for the feudal donation was not extended beyond the life of the feudiary or vassal, by any presumed intent, but, as Craig observes, was taken strictly:—*Feudum ex sua natura est species quædam donationis et æquum est ut omnes donationes sint stricti juris, ne quis plus donasse præsumatur, quam in donatione expresserit*†."

Now, no one could succeed to a proper feud, without the consent of the lord; and all feuds were holden of the chief lord or the king, according to the principles of the feudal law existing in each country. Then came *improper* feuds; the introduction of which, changing in a great measure the ancient feudal simplicity, and giving way to many new devices, it became a necessary rule or

* Lib. feud. 1 t. i. † *De jure feud.* 50.

direction of the law of feuds, that in consideration of a feud *tenor investituræ est inspiciendus*; and that for the reason, as Wright observes, expressed in a like maxim of our law, *Modus legem dat donationi.* And as the same author further observes, "that in the consideration of *improper* feuds, of which sort most feuds are at this day, not only the terms contracted, but the customs of the country where the feud lies, is to be nicely observed;" or as Craig expresses it, "*Mos Regionis non minus dat Legem feudo quam tenor.*"

Thus the introduction of improper feuds introducing with them such variety of laws and customs as the genius and disposition of different countries and people induced, it became a necessary rule, that in all cases the custom of *the* land—the *lex loci rei sitæ* must be particularly observed.

Fortunately, this truth has been too often acknowledged, and by too able writers, to admit of confutation at this day. But as authorities are more convincing than a bare statement, in addition to what has gone before, I must beg attention to the following:—

"This collection," says Erskine*, speaking of the *Consuetudines feudorum*—"in so far as it is the work of private hands, does not appear to have been confirmed by the express authority of any of the German emperors. But it is generally agreed that it had their approbation, and was accounted the customary feudal law of all the countries subject to the empire, except in a few particulars, where it appears, from the collection itself, that different or contrary usages, were observed in different cities or districts. But no other state hath acknowledged the

* L. 2, t. iii. s. 6.

authority of those written usages. Every kingdom hath formed to itself such a scheme of feudal rules as best agreed with the genius of its own constitution; and the system received in Scotland, differs so widely from the *Consuetudines feudorum* in the most important articles, that whoever studies them as common feudal rules, without duly attending to the special usages of our own country, will wish to unlearn them when he comes to practice in our courts. In the deciding, therefore, of feudal questions, every state is to have regard, in the first place, to its own statutes or customs."

To the same effect speaks Mr. Butler, in his Preface to the thirteenth edition of Coke on Littleton:—"It is allowed," says he, "that the feudal polity of the different countries of Europe is derived from the same origin; that there is a marked similitude in their principal institutions; and a singular uniformity in the history of their rise, perfection, decline, and fall. But the more we go from a view of their general constitutions and governments, to a view of their laws and customs, the less this similitude and uniformity are discoverable.

"Thus," he continues, "the history of every country where the feudal laws have prevailed, while it presents us, on the one hand, with an account of the many restraints imposed by them upon alienation, and of the many methods which have been taken to make property unalienable, presents us, on the other, with an account of the different arts which have been used to elude those restraints, and to make property free. This is as observable in the law of England, as it is in the law of any other country.

"But the mode by which it has been effected in Eng-

land is *peculiar* to England. In other countries, where a liberty of alienation has been introduced, it has rested on a kind of compromise with the lord, by paying him a certain fine; and a kind of compromise with the relations of the feudatory, by allowing them a right of redemption, commonly called the *jus retractus*.' But the steps by which a free alienation of property has obtained ground in England are very different. In England, an unlimited freedom of aliening socage and military land was soon allowed; the practice of subinfeudation was soon abolished; the alienation of lands was restrained by the introduction of conditional fees, and afterwards by the introduction of estates tail; entails from their first establishment were greatly discountenanced by the courts of justice, and they were eluded by the doctrines of discontinuance and warranty. In the course of time, a fine was made a bar to the claims of the issue in tail, and a common recovery to the claims both of the issue, and of those in remainder and reversion. Most of these circumstances are peculiar to the History of England. Hence, an English reader, who opens the writings of the foreign feudists with an expectation of finding there something applicable to the practical parts of the law of his own country, respecting the alienation of landed property, will be greatly disappointed. He will find the most positive prohibition of aliening the fee without the consent of the lord: he will find very nice and subtile disquisitions of what amounts to an alienation; he will find that in some countries the lord's consent still continues a favour; that in others it is a right, which the tenant may claim on rendering a certain fine. In short, he will find the works of foreign feudists filled with accounts of

the '*jus retractus*,' or 'droit de rachat,' the 'retraite lignager,' and the 'droit des lods et des ventes;' but he will hardly find the words, or any thing equivalent to the words, conditional fee, estate tail, discontinuance, warranty, fine, or recovery, in the sense in which we use them." The peculiarity of the law of descents of different countries is a further illustration of this position. The strongest features in our own laws of descents are formed on the principles of the feudal law as received in this kingdom. So powerfully have those principles operated throughout our institutions, that the succession to the crown itself is governed by precisely the same rules as influence a common inheritance. There are, indeed, two exceptions to the uniformity of these two courses of descent; but these arise from the special nature of the regal office, and are no exception to our feudal principles. The crown descending by right of primogeniture amongst females of equal degree, and not as in common inheritances—in co-parceny, is from the evident necessity of a sole succession to the crown having induced the royal law of descents to depart in this instance from the common law. The non-exclusion of the *half-blood* from the inheritance of the crown, has its foundation in the notoriety of the royal pedigree excluding the necessity of this presumptive rule of evidence for discovering a personal descent from the first *purchaser*.

But the laws of descent of *Scotland*, though having their foundation in feudal principles also, are a superstructure very dissimilar to our own. If, then, it be allowed that the countries of England and Scotland are to retain their respective independent laws,—surely it must be conceded that every question of Scottish heritage

ought to be determined by the law of Scotland; and every question of inheritance in England be determined by the laws of this country.

As was observed in the very learned opinion delivered by Lord Cragie, in the beforementioned case of Munro *v.* Ross*, "In the early feudal ages, individuals held lands in different countries, subject to different superiors; and it was not unusual for the sovereign of one country to be a sub-vassal in another, and without any obligation to reside in any particular place, though all were liable to be called out to attend the superior in the performance of their feudal services. It would have been most extraordinary, therefore, if the vassal's preferring one country to another should entirely govern the course of his succession, in opposition to the general law of the country where the lands were situated. Not more than a century ago, the noble family of Hamilton, besides their Scotch estates, held an extensive territory, with the rank of Duke, in France; and it is believed they also had property in England; but it never was imagined that the representative of the family at the time, merely by preferring one of these three kingdoms as the place of his general residence, could alter the law of descent as it was fixed in the other countries."

To illustrate this position, and show the full truth of the passage, we may revert to a kingly example.

"The kings of Scotland had feodal possessions HERE. For instance, the counties of Cumberland, Northumberland, and Westmorland, were anciently held of the crown of England, by the kings of Scotland, attended with several vicissitudes and changes, until the feast of St. Michael,

* 5. Shaw and Dunlop, 626.

1237; at which time, Alexander, king of Scotland, finally released his pretensions thereunto; as appears by the deed thereof, entered into the Red Book of the Exchequer, and the Parliament Book of 20 Edward I. In consideration thereof, Henry III. gave him the lands of Penreth and Sourby, *habend' sibi* HEREDIBUS SUIS REGIBUS SCOTIÆ; *by virtue of that special limitation* they came to John, the eldest son of the eldest daughter of Alexander, king of Scotland, together with that kingdom. *But* the land of *Tindale*, and the manor of *Huntingdon*, which were likewise given to him *and his heirs*, but *without* that special limitation, LEGIBUS SCOTIÆ, fell into coparceny; one moiety thereof to the said John, king of Scotland, as the issue of the eldest daughter, and the other moiety to Hastings, who was descended from the younger daughter of the said Alexander*." A stronger or a more important illustration than this of the supremacy of the *lex loci rei sitæ* in ruling the succession to land could scarcely be wished for. The passage proves two facts: first, that the personal dignity even of the chief lord of the fee, the first and most superior of men—of one country, cannot control the laws of another; and, secondly, that the term 'heir' unless particularly qualified, is to be understood in the sense and acceptation of the laws of England, when it is the foundation of a claim to real succession in this country.

It has arisen through not adverting to the broad distinction between a natural and a civil claim; between an institution of nature, and a right founded in civil compact, that some have not duly distinguished the different

* Sir Matthew Hale's History of the Common Law of England, 279.

relations of a *son* and an *heir*. "*Hæres est nomen juris; Filius est nomen naturæ.*" This distinction subsists not with respect to different countries only, but in the very same country, in regard to different lands, this truth is apparent. The term "*heir*" is technical, and has reference to a particular inheritance. If an only child in this country has taken by descent an estate from his father, and another from his mother, on his death without issue, these estates will descend to different persons; in other words, there will be two different heirs. To call one of such successors *the* heir, as a personal distinction, and not with reference to the particular lands he had inherited, would consequently be a very incorrect predicate; he can be distinguished only as *an* heir, or *one* heir, or more correctly, as the heir *to certain lands*. In short, the right to inherit is *not personal*, but the law annexed to the *land* itself points out the person to enjoy it. The right to inherit Gavelkind lands in Kent does not depend on any personal status arising from the place of the contract of parents' marriage, the place of birth, or the domicile,—but on the common law of Kent; for 'the custom is chained to the land.' An *eldest* son cannot maintain a claim as heir to lands of the nature of Borough-English, or of Gavelkind, although his parents had been married or domiciled, or he himself domiciled, or born, in a county or district in which he would have inherited, had his ancestors died seised of lands in such county or district. The status of the son is a secondary consideration; the nature of the land in point of descent is the first question. The power to inherit at all, as we have seen, was at first only permissive; it exists now in the manner alone in which it was permitted. The title through *primogeniture*, in any case, is merely fortui-

tous, and is wholly unwarranted by the *principle* of the very law from which it is derived*; it operates at this day on such land only as the course of its descent permits.

There is, indeed, one status in this country which may perhaps be thought an exception to this doctrine; that is the status of sovereignty. If the king purchase lands of the custom of Gavelkind, or of the custom of Borough-English, he is seised *in jure coronæ*, and they descend together with the crown, and not according to the custom of the land†. But first, the king being the supreme lord of whom all lands in the kingdom are holden, he himself cannot be subject to tenure, inasmuch as he cannot hold of himself,—the maxim, *nemo potest esse tenens*

* The succession to the feuds was by *all* the sons. Lib. Feud. 1 t. 8. "But," as Dalrymple observes, "the incompatibility of performing that service by many, which, as the feudal services were of various kinds, could perhaps be performed only by one, being observed, the law of nature, and which, till then, had been in private successions, with very little exceptions the law of the world, gave place totally to a law which was peculiar to feudal principles, and the succession, not only of the daughters who had long before been excluded, but that of all the sons in general, gave way to the succession of *one* son, and one son only.—At the same time, as the feudal nations were very long in continual dangers, both from foreign invasions, and from intestine commotions, it was plainly incongruous, that the chance of being the first-born should give the possession to a person perhaps unfit to defend it; therefore, the grantor reserved to himself the power of choosing the particular son whom he pleased to give the fief to." (Lib. Feud. 1. t. 1.)

"Some ages after, when security in the feudal settlement made this chance direction (*viz.* to the eldest son) of less dangerous consequence, the natural principle of giving the fief, since one could only regularly have it, to that son who first presented himself *in the train of ideas*, took place; and the right of primogeniture came to be fully established."—Dalrym. Feud. Property, 201—203. And Sir Martin Wright (quoting Lib. Feud.) says, that "the course of succession of all *proper* feuds belonged to the sons (exclusive of daughters) and to them equally; until by a constitution of the Emperor *Frederick*, *honorary* feuds became *indivisible*, and as such they, and in *imitation* of them, military feuds, in most countries, began to descend to the eldest son only."—Wright's Ten. 31, 32.

† Rob. Gavel. 82. Co. Lit. 15. b.

et Dominus, though antiquated with respect to the subject, must, I conceive, be always applicable to the purchases of the chief lord; and secondly, the dignity of the king is such, that he cannot sever his body *natural* from his body *politic* *; and, whenever he acts, he is consequently acting in his superior capacity—in his political. And even this case of the king is not properly a *personal* status, but the dignity and power annexed to the *regal office*, controlling the customary nature of the descent: for purchases made *before* the accession to the crown vest in the *natural* capacity †. And we have seen that this prerogative does not extend even to the status of sovereignty of another kingdom. The king of Scotland held lands here of the lord, by the law of the land. Much less, then, can it be expected that a foreign *subject*, by introducing his personal status, could inherit, in opposition to the law annexed to that land which he would wish to possess.

The conclusion is, whoever claims *as* heir, must be heir within the meaning of the law applying to that land which he claims to inherit.

And now to apply the foregoing to the respective countries of England and Scotland:—And first for the first of these.

1. First, by the law of England, a child born before, or out of marriage, is *bastard*, and is not rendered legitimate by the subsequent intermarriage of his parents; he is *neither* "*legitimus*" *nor* "*legitimatus*." "I read in *Fleta*," says Coke ‡, "that there be three kinds of bastards, viz., *manser*, *nothus*, and *spurius*, which are de-

* Case of the Dutchy of Lancaster, Plow. 212.
† Hale's MSS. note Co. Lit. 15. b.
‡ Coke Lit. 244 a.

scribed in two old verses, &c. But we term them *all* by the name of bastards that be *born* out of lawful marriage." Again, "*Bastard* is he that is born of any woman not married*." *Finch* says†, "He that is *begotten* out of marriage is called bastard," (though the word 'begotten' is certainly a misprint for 'born,' as appears from his very next words); "for if," says he, "a woman great with child take a husband, the issue *born*, though it be within six weeks *after*, is no bastard."—"*Qui ex damnato coitu nascuntur inter liberos non computantur*"—is a maxim frequently quoted by Coke; and Littleton, as well as he, doth several times designate such *filii nullius*. "A bastard, by our English laws," says Blackstone, "is one that is not only begotten but born out of lawful matrimony. The civil and canon laws do not allow a child to remain a bastard, if the parents afterwards intermarry: and herein they differ most materially from our law; which, though not so strict as to require that the child shall be *begotten*, yet makes it an indispensable condition, to make it legitimate, that it shall be *born* after lawful wedlock‡."—"The doctrine of legitimacy by a subsequent marriage," says Mr. Butler§, "was never admitted into the English law; and the refusal of the noblemen of our nation to admit it, on the occasion mentioned in Sir Edward Coke's Commentaries, is spoken of by Sir William Blackstone and other writers as a memorable instance of their jealousy of the civil law, and their firmness in opposing foreign innovations." Thus we see, on the foregoing express authority, that a child born before marriage is bastard, and also that he cannot be made legitimate by the law of this

* *Les Termes de la Ley*, tit. '*Bastard*.'
† *Finch's* Law, (*edit.* 1627), p. 117. ‡ 1 Com. 454.
§ N. 1 Co. Lit. 245. a.

country through the subsequent espousals of his parents. Now, Lord Coke says, "*Hæres*, in the legal understanding of the common law, implyeth, that he is *ex justis nuptiis procreatus*; for *hæres legitimus est quem nuptiæ demonstrant**." This, to my mind, is conclusive. But as I am aware that there are some who imagine that this definition of Coke does not conclude the non-admission to the inheritance of children born before the marriage of the parents, we will go to the second point I propose on this head, which is, that—

2. A man born before marriage is not only a *bastard* in this country, but, by the express and positive law of England, he cannot inherit lands in England, even though his parents do subsequently intermarry. And, however some may dislike the citation of "old authors," I shall take the liberty of commencing with the eldest in our law—Glanville. For, as Sir William Jones has observed,† "as to our *ancient* lawyers, if their doctrine be *not law*, it must be left to mere historians and antiquaries; but if it remain unimpeached by any later decision, it is not only equally binding with the most recent law, but has the advantage of being matured and approved by the collected sagacity and experience of ages." "Orta est quæstio," says Glanville‡, "si quis, antequam pater matrem suam desponsaverat, fuerit genitus vel natus, utrum talis filius sit legitimus hæres, cum postea matrem suam desponsaverat: Et quidem licet secundum canones et leges Romanas talis filius sit legitimus hæres, tamen secundum jus et consuetudinem regni nullo modo tanquam hæres in hæreditate sustinetur, vel hæreditatem de jure regni petere potest."

* Co. Lit. 7. b. † Essay on the Law of Bailments, 76.
‡ Glanv. l. 7. c. 15.

"This decision of Glanville," observes Lord Littleton, "is very remarkable; as it shews the entire independence of the law of England on the canon and civil laws in his time*." And this decision, I may add, is very important, as it shews, that one born before the marriage of his parents, could not inherit lands in England so early as the reign of Henry II.

Now comes the statute of Merton, 20 Hen. III. c. 9. Here the Bishops, as Lord Coke observes, specially move and request the parliament to alter the law of the land, *because* it is contrary to the law of the church; which requèst is refused with great warmth and firmness. And as this statute is so germane to the matter in hand, standing as it does unimpeached by any later authority, and therefore as binding at this day as it was in the reign of Henry III., I shall extract it verbatim from the Second Institute.

"Ad breve Regis de Bastardia, utrum aliquis natus ante matrimonium habere poterit hæreditat', sicut ille qui natus est post matrimonium, Responderunt omnes Episcopi, quod nolunt nec possunt ad istud breve respondere, quia hoc esset contra communem formam Ecclesiæ. Et rogaverunt omnes episcopi magnates, ut consentirent,

"To the King's writ of bastardy, whether one being born before matrimony may inherit in like manner as he that is born after matrimony, all the bishops answered, that they would not, nor could not, answer to it; because it was directly against the common order of the church. And all the bishops instanted the lords, that they would consent,

* Note to the Translation, by Mr. Beames. (3 Litt. Hist. Hen. II. p. 125.)

quod nati ante matrimonium essent legitimi, sicut illi qui nati sunt post matrimonium, quantum ad successionem hæreditariam, quia Ecclesia tales habet pro legitimis. Et omnes Comites et Barones una voce responderunt, quod nolunt leges Angliæ mutare, quæ hucusque usitatæ sunt et approbatæ."

that all such as were born afore matrimony should be legitimate, as well as they that be born within matrimony, as to the succession of inheritance: forsomuch as the church accepteth such for legitimate. And all the earls and barons with one voice answered, that they would not change the laws of the realm, which hitherto had been used and approved."

"And herewith," says Coke, having cited Glanville, "do agree not only our ancient authors, but the constant opinion of the judges in all succession of ages ever since, of the ancient law of England. Hereupon these two conclusions do follow:—

"1. That any foreign canon or constitution made by the authority of the pope, being (as Glanville saith) *contra jus et consuetudinem regni*, bindeth not until it be allowed by act of parliament, which the bishops here prayed it might have been; for no law or custom of England can be taken away, abrogated, or adnulled, but by authority of parliament.

"2. That although the bishops were spiritual persons, and in those days had a great dependency on the pope, yet in case of general bastardy, when the king wrote to them to certify who was lawful heir to any lands, or other inheritance, they ought to certify according to the

law and custom of England, and not according to the Roman canons and constitutions, which were contrary to the law and custom of England, wherein the bishops sought at this parliament to be relieved*."

Bracton†, having quoted the statute of Merton, goes on to say, that though the statute is contrary to the canon law, that this is of no importance with respect to our municipal laws regulating temporalities, declaring that the canon law can have nothing to do with the right of succession. "Ad papam et ad sacerdotium," says he, "quidem pertinent ea quæ spiritualia sunt, ad regem vero et ad regnum ea quæ sunt temporalia, juxta illud, Cœlum cœli domino, terram autem dedit filiis hominum. Et unde ad papam nihil pertinet ut de temporalibus disponat vel ordinet, non magis quam reges vel principes de spiritualibus, ne quis eorum falcem immittat in messem alienam. Et sicut papa ordinare potest in spiritualibus quoad ordines et dignitates, ita potest rex in temporalibus de hæreditatibus dandis vel hæredibus constituendis secundum consuetudinem regni sui. HABET ENIM QUODLIBET REGNUM SUAS CONSUETUDINES ET DIVERSAS, POTERIT ENIM UNA ESSE CONSUETUDO IN REGNO ANGLIÆ ET ALIA IN REGNO FRANCIÆ QUANTUM AD SUCCESSIONES."

And Fleta also, under the head "De exceptionibus contra personam querentis in generali‡," among others, enumerates bastardy. And in the next chapter, speaking of the manner in which the question of bastardy is to be tried, says, "Sunt etiam aliæ causæ bastardiæ quarum cognitio ad curiam Christianitatis non est demandanda,

* 2 Inst. 97. † L. 5. fol. 416, 417. ‡ L. 6. cap. 38.

ut si tenens excipiendo dicat petentem nihil juris habere quia bastardus pro eo quod natus fuit antequam pater suus matrem suam desponsavit."

But this case, he afterwards says, should be tried by the "*temporal Judge*," because, according to the *canon* law, such a person is legitimate, but by the law of *England* he is bastard.

Liber Assisarum, anno 11 Edward III., 20, "*John de Bingham* brought an Assise of Mortdauncester, as son of *Henry de Bingham*. It was pleaded in bar, that he was born before espousals, and the statute of Merton was quoted. It was then said, that it should be certified by the bishop, whether he was born before or after espousals, and that judgment must be given by the law of the land. And the prelates said, they were afraid to answer, inasmuch as an ascertained bastard was in all cases excluded from any thing. The writ abated."

This was a tolerable confession by the bishops of the hopelessness of establishing their favourite principle of legitimation; and, as they refused to certify under such circumstances, it came to be established, as Lord Coke observes, after citing an instance of this kind, "that special bastardy (*viz.*, that the defendant, &c., was born before espousals) was to be tried in the king's courts, and general bastardy in court Christian; and herewith agreeth our old books, and the constant opinion of the judges ever since*."

So Fortescue †, who at the request of the prince is declaring some cases in which the determinations of the laws of England, and the civil law of nations, (as Mr.

* 2 Inst. 99.

† De Laudibus Legum Angliæ, cap. 39.

Amos has rendered *Civilium*) disagree, says, "Prolem ante matrimonium natam, ita ut post legitimam, Lex Civilis et succedere facit in hæreditate parentum; sed prolem, quam matrimonium non parit, succedere non sinit lex Anglorum, naturalem tantum eam esse, et non legitimam proclamans."

Lord Coke in his commentary on the statute of Merton says*, "Some have written that William the Conqueror, being born out of matrimony; Robert, his reputed father, did after marry Arlot, (query, *Harlot?*) his mother, and that thereby he had right by the civil and canon law, but that is *contra legem Angliæ*, as here appeareth." Now, this shows, that with respect even to a person claiming the throne, although he himself was born, and his parents had intermarried, and were domiciled, in a country in which legitimation *per subsequens matrimonium* was the law, yet that this has no weight in the claim to a legal right in *England*. The fact is, that, with respect to the case of William the Norman, neither the canon law nor the law of England, as now constituted, had any concern. *William* came to this throne A. D. 1066, and died A. D. 1087. The *canon* law on the subject of legitimation was copied from the civil law, and adopted by the Pope A. D. 1160, (6 Henry II.) As to the law of England, at the period of the entry of the Normans, it attached no disability to bastardy. For William, from *Spelman*'s account, appears to have considered his own bastardy rather a title of distinction than a subject of disability, or even of disgrace. "*Nec illius igitur gloriosum Angliæ subactorem Willielmum Norma-*

* 2 Inst. 99.

num, puduisse videtur, qui epistolam (ut alias plures) ad Alanum Britanniæ minoris Comitem, sic orditur ;— Ego Willielmus cognomento BASTARDUS*." He would hadly have been so mad as to have written thus, had there been even a *question* of a bastard's incapacity to the throne at that time.

Blackstone, enumerating persons incapable of inheriting, says, " Bastards are incapable of being heirs. Bastards, by our law, are such children as are not born either in lawful wedlock, or within a competent time after its determination. Such are held *nullius filii*, the sons of nobody; for the maxim of law is, *qui ex damnato coitu nascuntur, inter liberos non computantur.*" Then he goes on to say, " The civil law differs from ours in this point, and allows a bastard to succeed to an inheritance, if after its birth the mother was married to the father; and also, if the father had no lawful wife or child, then even if the concubine was never married to the father, yet she and her bastard son were admitted each to one twelfth of the inheritance: and a bastard was likewise capable of succeeding to the whole of his mother's estate, although she was never married; the mother being sufficiently certain, though the father is not. But our law, in favour of marriage, is much less indulgent to bastards †."

Now, by every one of the foregoing authorities, a person born before the marriage of his parents is expressely and positively excluded from inheriting lands in this country; and this, too, in the very face of, and in direct opposition to those identical laws by which he may become legitimate in a foreign country—the civil and canon laws.

* Spelm. Gloss. verb. '*Bastardus*.' † 2 Com. 247.

These authorities are all founded in direct opposition to any foreign law or practice which exhibits the contrary principle; they are all manifestly and positively opposed to any status or condition, having its foundation in the contrary principle.

There is, indeed, the case of *bastard eigné* and *mulier puisné*, which might be thought an exception to this general conclusion, of the incapacity of bastards to inherit by our law. This case, however, has its foundation in very special circumstances, and, most certainly, is no exception to the principles already laid down. The case arises, as is well known, when a man has a bastard son and afterwards marries his mother, and then has by her a legitimate son. The eldest son is bastard, or *bastard eigné*; the younger son is legitimate, or *mulier puisné*. If then the father die, seised in fee, (a very material point, which Blackstone, notwithstanding his usual extreme accuracy, has overlooked *,—for it holds not in the case of an estate tail†,) and then the bastard entereth claiming as heir to his father, and occupieth the land during his life, without any entry made upon him by the *mulier*, and dieth seised of such estate in fee, leaving issue actually born, to whom the inheritance descends; in this case the *mulier puisné* and all others (though minors, feme coverts, or under any incapacity whatsoever) are totally barred of all right; and the issue of the bastard thereby becomes lawful heir. The first reason given for this by Blackstone is, "as a punishment on the *mulier* for his negligence in not entering during the *bastard*'s life-time, and evicting him." The reason given by Coke‡—"*Justum non est aliquem*

* 2 Com. 248. † Lit. s. 399. Co. Lit. 243. b.
‡ 1 Inst. 244. a.

post mortem facere bastardum, qui toto tempore vitæ suæ pro legitimo habebatur"—is too general, inasmuch as it is applicable to all bastards; but it has been decided that the rule that a person shall not be bastardized after his death, is only good in the case of *bastard eigné* and *mulier puisné**. The second reason given by Blackstone in this case is open to the same observation.

The strongest feature in the case is, I conceive, the *entry* of the bastard claiming as heir to the father, and his continued undisturbed possession. The bastard not being of kin to the *mulier*, his entry, in consideration of law, cannot be to preserve the possession to, but to obtain one distinct from, the *mulier*; it is therefore unlawful, and consequently must, I imagine, operate as an *abatement*. Now the only colour of title to enter on the part of the *bastard*, must have been his legitimacy by the canon law; and the *mulier* having allowed the entry and undisputed possession of the land, and the performance of the duties and services of tenure up to the bastard's death, the lord will not unravel the matter after the land has descended; for the bastard having been permitted to perform the services during his life without objection, the allegation of bastardy comes too late, when the *personal dishonour* (the ground of his exclusion by the feudal law†) has ceased, and to the next person in possession this reproach cannot apply. And I think the *abatement* and the descent, thereupon, are allowed to work the extraordinary effect of barring the absolute *right* in this case, as a signal retribution on the *mulier*, for having permitted his lord and the law of the land to be deceived and frus-

* Pride *v.* the Earls of Bath and Montague. 1 Salk. 120.
† Gilb. Ten. 50.

trated under an entry grounded on a pretence of legitimacy by the canon law. If the parents had not intermarried at all, there could have existed no shadow of title; but to obviate fraud or collusion where it might be practised, it was rendered imperative on the part of the *mulier*, in order to save his right, to relieve his lord from the imposture, by making his claim in this particular case, during the period of its existence.

The immunity, in this case of *bastard eigné* and *mulier puisné*, it will be observed, however, is not applicable to the bastard himself, who is liable to eviction at any period during his life; it applies only to his issue. This special case, therefore, is no exception to the position—that a bastard cannot inherit by the law of this land: it is rather an illustration of his *in*capacity.

The origin and reason of the exclusion of these persons from the inheritance in England, is but a secondary consideration, seeing that they *are* excluded by the positive law. I may observe, however, that by a principle of the feudal law, adopted in this country, this exclusion may be plainly accounted for. "Bastards, or children born out of wedlock," says Gilbert *, "were totally excluded from all feudal succession, though their parents had afterwards intermarried, because the lords would not be served by any persons that had that stain on their legitimation, nor suffer such immoralities in their several clans; though the civil law admitted them as adopted by the subsequent marriage, and so the canon law, because the matrimony wiped off the precedent guilt."—And, moreover, our law has many other good reasons for excluding these persons, which do not appear to have been observed.

* Hist. Feuds, 20.—quoting *Craig*.

Bastards are a distinct class in the history of our law. A bastard could not be a *villein* *; for as he could gain nothing, it was just that he should lose nothing, by his birth. A bastard is no consideration to *raise a use* †. He is not a *child* within the meaning of the statute (32 Hen. VIII.) of wills ‡. If "a man makes a lease to B. for life, remainder to the eldest issue male of B., and the heirs males of his body;—B. has issue a bastard son, he shall not take the remainder, because in law he is *not* his issue; for *qui ex damnato coitu nascuntur, inter liberos non computentur* §."—"The rule cannot be stated too broadly, that the description, 'child,' 'son,' 'issue,' every word of that species, must be taken, *primâ facie*, to mean legitimate child, son, or issue ‖."

Now, if our law had permitted legitimation *per subsequens matrimonium*, the bastard might be made a *villein*, or continued a freeman, at the caprice of his reputed parents; a man born to a state of freedom might, by a subsequent act, to which he could neither give nor withhold consent, be placed in a status of slavery. The decision that the bastard was no consideration to raise a use, might be rendered false and absurd by matter *ex post facto:* He who had been held to be no 'child,' no 'son,' no 'issue,' becomes a child, son, and issue, in spite of the legal decision,—by which good cause does arise, through matter *ex post facto*, for the *reversal of every decision of this kind;* for the subsequent marriage, it is said, relates back to the period of the birth, and the issue is thereby *legitimus*, and not *legitimatus.*

In addition to this, we must again look to our feudal

* Lit. s. 188. † 1 Inst. 123. a. ‡ 1 Inst. 123. a.
§ 1 Inst. 3. b. ‖ Per Lord Eldon, 1 Ves. and B. 462.

law. Feuds, we know, were for a long time granted during pleasure only, and sometimes for years; and when succeeding ages continued them for life, and the policy and indulgence of subsequent times endowed them with an hereditary quality, there existed no injustice in moulding and regulating their hereditary capacity, conformably to the genius of the same days. Indeed, after feuds were allowed to descend to the male issue, it was for some time in the power of the lord to elect, from the sons of his late tenant, that one whom he considered best qualified to perform the feudal services. And this renewal of the tenancy in the person of the chosen son, was for a long period acknowledged rather as a favour than a right, as appears by the 'relief' constantly due on such occasions. The power to hold the land at all, and the only right or title to it, is grounded on the compact or agreement with the lord. It is not likely, under these circumstances, that the lord would consent or assent to the succession of one not approved of by himself; and as this assent to the succession of those born before espousals was never given and cannot now be given as the law stands,—but, on the contrary, as such persons are excluded by the general compact and agreement of all the lords and tenants of this country, *viz.* by the law of the land—it matters but little whether the exclusion of bastards in general, or of this kind of bastard in particular, is founded on good policy, or in bad prejudice. But one thing is material, and very material, in considering cases of this description,—a vested legal right.

The interest of the lord in his right by '*reverter*,' or what is commonly termed '*escheat*,' has too often

escaped observation in reasoning on the exclusion of bastards. 'If a man die seised of real estate of inheritance, leaving no legitimate kindred, the land reverts to the lord. It is manifestly, therefore, to the interest and advantage of the lord, at this day, that bastards should not inherit. This right of reverter in the lord is as much a legal and recognised interest, as is the title of the heir. That system of chivalry, the feudal constitution, which, in theory at least, was certainly founded on the principles of private and unsullied honour, as well as on public security, would have been tarnished in the estimation of those times, by the admission of illegitimate blood. And, however lightly our forefathers' conceptions of honour and morality may weigh, in these more enlightened and virtuous days—certain it is, that *the right of reverter in the lord remains.* This right cannot be avoided in order to overcome the hardship or difficulty of any case.

It may here be noticed, that it has been contended as a matter of *convenience*, that a 'personal status' should prevail, in opposition to the '*lex loci rei sitæ*,' in questions touching legitimacy or illegitimacy, as to the right of succession to real estate. In answer to this, I only ask, if it be *more* convenient to send out a commission to ascertain the law of the islands of *Otaheite*, *Kilchtak*, or *Juan Fernandez*, whichever may happen to have been the place of *contract* or *birth*, than to determine the question by the law of that country in which the land lies, and *in which* the claim must be maintained?

I think I have already shewn that the law of England must govern the decision of a question touching the descent of lands in England. I think I have also shewn,

by clear, positive, and binding authority, that children born before the marriage of their parents—in the common sense and acceptation of the words—are bastards by the law of this country; and moreover, as a distinct point, that children born before espousals are expressly excluded from inheriting lands in England, by the law of this country. I trust I have wrenched no authority to this purpose, nor strained the plain and direct meaning of the law to this conclusion.

And now, to apply the foregoing to the case of *Doe* d. *Birtwhistle* against *Vardill*. Alexander Birtwhistle, being seised of land of inheritance in England, went into Scotland in the year 1790. That country, it is allowed, became the place of his domicile. A certain woman called Mary Purdie was also domiciled in Scotland. These persons cohabited together, and produced John Birtwhistle, the lessor of the plaintiff, the only son of the said Alex. Birtwhistle, born in Scotland. Alexander Birtwhistle and Mary Purdie afterwards intermarried in Scotland, according to the laws of Scotland. Alexander Birtwhistle afterwards died in Scotland, so seised of lands in England as aforesaid. The question was, whether the lessor of the plaintiff could inherit these lands in England. The case was tried before Mr. Justice Bayley, at the Yorkshire spring assizes, 1825, when the Jury found a special verdict to the foregoing effect. The case reserved came on for argument in the Court of King's Bench, in Easter Term 1826*. It was quite clear that by the law of Scotland, John Birtwhistle was legitimate and capable of inheriting land in that country. But the simple question was, is he heir by the law of England to

* 5. Barn. and Cress. 438.

the lands in England? The Court of King's Bench unanimously decided that he was *not*. And I think it will be difficult to find *a single authority of English law, for a contrary conclusion.* The case is now standing for hearing in the House of Lords on a writ of error.

I now come to consider the foregoing pages, as applicable to the inheritance of lands in Scotland.

II. It is laid down by all the institutional writers on the law of Scotland, without any restriction, save that of mid-impediments, that marriage between parents in Scotland, legitimates children previously born *quoad* all civil purposes in that country *.

I think I have already established the principle, that every question concerning succession to land in Scotland must be governed by the law of that country; and have also negatived the application of personal status, or domicile, as opposed to this principle.

"A Scotchman by birth, who inherited a landed property, and succeeded to an entailed estate in Scotland, but settled in England in early life, making occasional visits to Scotland for business and amusement, having, after about forty years residence in England, had a son by an illicit connexion with an English woman, and having come four years thereafter to Scotland, accompanied by the child and the mother, where, after a residence of fifteen days, he was married to her; and having remained in Scotland for about two months, and then returned to England with his wife and child, where they resided till his death—Held, in a declarator of bastardy brought at the instance of the next heir to the en-

* Bankton, p. 121.—Ersk. Inst. l. 1. t. vi. § 52.

tailed estate, that the son was legitimated by the marriage of his parents*."

Now, the simple question in this case was, whether a man, previously born, was legitimate by the subsequent legal intermarriage of his parents in Scotland, for the purpose of inheriting lands in *that* country; in other words, whether the law of Scotland was to govern the succession to land in that country? It was determined by the unanimous opinion of all the Judges of Scotland (excepting *three*), that *he was* heir to the land in Scotland.

I shall take the liberty of making a few extracts from some of the opinions of the Judges in this case; which, while they exhibit the grounds of its decision, support, I conceive, several of the positions I have endeavoured to maintain throughout the foregoing pages.

"There is no longer," says Lord *Cragie*, "any dispute as to the legality of the marriage between his father or mother, which was not collusive or simulate, but true and regular in all respects, and followed out in every possible way by the acts and deeds of the parties interested, and in all questions of status, so far as relates to the married pair. The question is, whether the defendant's right, as the eldest son and heir of his father by the law of Scotland, is to be defeated by the law of England, if (what is not very clearly ascertained) his father had his general residence in England at the time of his death? In some part of the argument the pursuer laid some stress upon the circumstance, that the defender had been born in England; but that seems to have been

* Munro v. Ross, 5 Shaw and Dunlop's Reports, 605.

given up, and rightly, the defender, before the marriage between the parents, being *nullius filius*, and having no interest in their status or domicile; while they had as little in his, except for the purpose of relieving the parochial funds of the expense of his maintenance.

"It humbly appears to me that in such a case there can be no just or solid ground of distinction between the authority of the law of England, and that of any other kingdom or country in Europe, in which the defender's father or mother might have their residence at any particular period. By the treaty which united the two separate and independent kingdoms of England and Scotland, no such distinction was established, or meant to be established. On the contrary, while the laws respecting the general government and revenues of the United Empire were as much as possible to be assimilated, it was an express condition of the treaty—and, from the state of the legislative body as then constituted, it was most just—that no alteration should be made in the law of Scotland, even by the legislature, (and most assuredly not by the courts of law of either country,) in matters of private right, unless for the evident utility of the people of Scotland. We are therefore to decide the point at issue as if the two kingdoms were still separate from each other, or as if it had occurred immediately after the accession of James VI. of Scotland to the English throne; and if at that time the law of the ancestor's domicile (in the meaning lately affixed to this expression; that is, the domicile of *choice*, in opposition to those of *origin* or *birth*, or that which is attended to in ordinary questions of jurisdiction) would not in the smallest degree affect the succession to

his landed estates in Scotland, it ought to have as little influence at the present time.

" * * * But in the transmission of landed estates from the dead to the living, as well as with regard to the mode of constitution of land rights, there is no rule of international law or *jus gentium*, such as has been already described. Instead of this, it seems to be established in all countries, where there is a law of succession regarding land estates or rights, or burdens affecting such estates, that they are transmitted and constituted according to the law of the country where the lands are locally situated. It is unnecessary to quote authorities on this point."

Lords Mackenzie and Medwyn, amongst other things, said—" We think it clear that legitimation *per subsequens matrimonium* is a general rule of the law of Scotland."

" Legitimation *per subsequens matrimonium* is now part of the undoubted law of Scotland."—Lord BALGRAY.

" The *comitas gentium* does not authorise the adoption of any other law, which is adverse to the usages or the common laws of the realm of Scotland."—Lord BALGRAY.

" I can see no authority for holding that the place of birth has any thing to with legitimation. I cannot suppose that it has, otherwise our institutional writers would not have overlooked it, if there was any such bar. On the contrary, Lord Bankton lays down the rule without qualification, and without reference to the law of England, that marriage legitimates the previously born children of the parents."—LORD JUSTICE CLERK.

"It appears that the defender's father was a native of Scotland, and his mother a native of England; but these facts seem to me to be of no consequence, as I am humbly of opinion that the *lex originis* of the parents cannot influence the determination of the present question. I am likewise of opinion that the domicile of the parents, at the time of the conception or birth of the child, is of no consequence. * * * It is not denied that the legal effect of a marriage in Scotland is to legitimate all the children previously born of the parties who contract the marriage."—Lord GILLIES.

"I should have viewed the case in the same light, had Mr. Ross been born in England, and had no other connection with Scotland than that arising, first, from his having possessed and left an heritable estate, subject to the jurisdiction of the courts of this country; and, secondly, from his marriage having been contracted in Scotland, when, as a natural-born subject of the crown of Great Britain, he was, as living within the territory of Scotland, in every respect as amenable to the peculiar provision of its laws and institutions, and as capable of acquiring rights and qualifications under them, as he would have been amenable to the laws and customs of England, had he chosen to remain in England, and to have contracted marriage within the boundaries of that division of the empire. In short, my judgment depends on this simple view of the case, that the defender's parents having, as natural-born citizens of Great Britain, been in a capacity, at the time of their marriage, to subject themselves to the peculiar laws and institutions of Scotland, and to the effects and qualifications thence arising; and having so subjected themselves by coming into this country, rendered

themselves amenable to its jurisdictions, and solemnizing their marriage according to its laws, customs, and institutions, did thereby contract all the obligations and consequences, which by them are attached to the state of marriage; and that one of these consequences being, that children antecedently procreated of such parents as may have afterwards married, and who were under no disability to marry, at the time of their conception and birth, shall be thereby legitimated, it must follow, that the defender is to be recognised as a lawful child, and his rights enforced accordingly. * * * * From these propositions, it is to be inferred, that when the *law of Scotland* is called upon to determine any case of legitimacy, *per subsequens matrimonium* (the marriage *within Scotland* being admitted), it requires no investigation in point of fact, excepting in two particulars; first, the filiation of the child; and, secondly, the condition of the parents at the time of its conception and birth, whether they were then free to have intermarried with each other, or whether they were capable of forming that connexion."—Lord MEADOWBANK.

Thus, I think, the positions I have humbly attempted to maintain are strongly supported by the opinions of these very learned judges, which I have now taken the liberty to quote. I shall not assume the liberty of remarking on the relative legal merits, in a scientific point of view, of the legal professions in the two countries; but I think I may be permitted to observe, that the decision of so large a majority of the Judges of Scotland, grounded as it is in principle, and maintained on authority, must be entitled to considerable weight, even in the House of Lords, on a question of Scottish law.

It is to be hoped, for the mutual independence of the laws of England and of Scotland, that when these cases shall be brought forward in the Supreme Court of Appeal, there may be present in the assembly of hereditary judges *one* whose profound legal talents and acquirements, and unwearied research, into the hidden and obscure mysteries of the law, have interwoven his name with law itself; the power and purity of whose legal decisions have been the theme of admiration and respect, no less of this country, than of the whole British empire.

FINIS.

LONDON:
Printed by WILLIAM CLOWES,
Stamford-street.